

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
EL PASO DIVISION**

**MILTON EDGAR HANSEN,**  
**Plaintiff,**

**v.**

**M. TRAVIS BRAGG, Warden,**  
**FCI La Tuna,**  
**Defendant.**

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**EP-09-CV-166-KC**

**ORDER ADOPTING REPORT AND RECOMMENDATION**

Before the Court is Plaintiff Milton Edgar Hansen's *pro se* civil rights complaint. Therein, Hansen, a prisoner at the Federal Correctional Institution - La Tuna, alleges Defendant M. Travis Bragg, the Warden at the Anthony, Texas facility, has violated his constitutional rights through his deliberate indifference to his reasonable request for dentures.<sup>1</sup> Hansen claims his lack of teeth denies him the opportunity to properly chew and digest his food.<sup>2</sup> Hansen asks the Court to order the Bureau of Prisons to provide him with a set of dentures. Also before the Court is Bragg's motion to dismiss or, in the alternative, motion for summary judgment. In his motion, Bragg maintains Hansen fails to state a claim on which relief may be granted.

On December 9, 2009, the United States Magistrate Judge to whom this matter was

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<sup>1</sup> In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the United States Supreme Court held that the violation of a person's constitutional rights by a federal official may give rise to an action for monetary damages in federal court pursuant to 28 U.S.C. § 1331, the statute that provides for federal question jurisdiction. A *Bivens* action is analogous to a 42 U.S.C. § 1983 action. The only difference is that § 1983 applies to constitutional violations by state, rather than federal, officials. *Abate v. Southern Pac. Transp. Co.*, 993 F.2d 107, 110 n. 14 (5th Cir. 1993).

<sup>2</sup> Hanson's dental records indicate a dentist extracted his teeth approximately one and one-half years before his incarceration. They further indicate he is on a waiting list for dentures. See Rep. & Rec. of Magis. J. 3 [Doc. No. 16].

referred issued a report and recommendation.<sup>3</sup> In his report, the Magistrate Judge recommends that the Court to grant Bragg's motion. He reasons Hanson has not alleged that Bragg was deliberately indifferent to a serious medical need,<sup>4</sup> but rather to a request for dentures.<sup>5</sup> He explains Hanson has not identified any specific act or omission by Bragg which would constitute deliberate indifference.<sup>6</sup> He adds "[e]ven viewed in the light most favorable to Plaintiff, the court finds that the record could not lead a rational trier of fact to find that Plaintiff had a serious medical need for dentures."<sup>7</sup> Moreover, the Magistrate Judge finds Bragg is entitled to qualified immunity from individual liability because Hansen has failed to allege a violation of a clearly established constitutional right.<sup>8</sup> Finally, he notes injunctive relief is not available from an official in his individual capacity regarding acts which could only be performed by an official

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<sup>3</sup> See 28 U.S.C.A § 636(b)(1)(B) (West 2009) (permitting a district court, on its own motion, to refer a pending matter to a United States Magistrate Judge for a report and recommendation).

<sup>4</sup> To establish an Eighth Amendment civil rights claim based on the denial of medical care, a prisoner must allege a defendant was deliberately indifferent to his serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976). A defendant is liable for deliberate indifference only if he knows an inmate faces a substantial risk of serious harm and disregards the risk by failing to take reasonable measures to abate it. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Unsuccessful medical treatments, acts of negligence or medical malpractice, and disagreements as to diagnosis or treatments do not constitute deliberate indifference. *Banuelos v. McFarland*, 41 F.3d 232, 235 (5th Cir. 1995). A serious medical need is one for which treatment has been recommended or for which the need is so apparent that even laymen would recognize that care is required. *Hill v. Dekalb Youth Detention Center*, 40 F.3d 1176, 1187 (11th Cir. 1994), *abrogated on other grounds by Hope v. Pelzer*, 536 U.S. 730 (2002).

<sup>5</sup> Rep. & Rec. of Magis. J. 9-10 [Doc. No. 16].

<sup>6</sup> *Id.* at 11.

<sup>7</sup> *Id.* at 16.

<sup>8</sup> *Id.* at 18.

acting in his official capacity.<sup>9</sup> To date, Hansen has not filed objections to the report.<sup>10</sup>

After independently examining the record for plain error,<sup>11</sup> the Court finds the Magistrate Judge's proposed findings of fact and conclusions of law are neither clearly erroneous nor contrary to law.<sup>12</sup> Accordingly, the Court enters the following orders:

1. The Court hereby **APPROVES** and **ADOPTS** the Magistrate Judge's report and recommendation.
2. The Court **GRANTS** Defendant M. Travis Bragg's motion to dismiss or, in the alternative, motion for summary judgment.
3. The Court **DISMISSES WITH PREJUDICE** Plaintiff Milton Edgar Hansen's

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<sup>9</sup> *Id.* at 8 (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring) ("However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit.")).

<sup>10</sup> Any party may contest a magistrate judge's report by filing written objections within ten days of being served with a copy of the report. 28 U.S.C.A. § 636(b)(1)(C). A district court "shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made." *Id.* A party waives this entitlement by failing to timely object to the report. *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988). Additionally, the Local Court Rules for the Western District of Texas require that the "written objections . . . specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections." Tex. W.D. LCVR 4(b) at App. C ("Assignment of Duties to United States Magistrate Judges"). Finally, a district court need not consider frivolous, conclusive, or general objections. *Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

<sup>11</sup> See *Morin v. Moore*, 309 F.3d 316, 320 (5th Cir. 2002) (stating that a litigant's failure to file written objections to magistrate judge's report within ten days of service mandates plain-error review on appeal); *United States v. Kallestad*, 236 F.3d 225, 227 (5th Cir. 2000) ("A party who fails to file written objections to a magistrate judge's proposed findings and recommendations waives the objection, and on appeal we will review the issue for plain error only."); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc) (explaining that a party who fails to file written objections timely to the findings of fact and conclusions of law in a magistrate judge's report shall be barred from appealing the factual findings and legal conclusions adopted by the district court, except in cases of plain error.).

<sup>12</sup> *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989) ("[T]he 'clearly erroneous, abuse of discretion and contrary to law' standard of review . . . is appropriate . . . where there has been no objection to the magistrate's ruling.").

*pro se* civil rights complaint for failure to state a claim on which relief may be granted.

4. The Court **DENIES** all pending motions, if any, as **MOOT**.
5. The Court **ADVISES** Plaintiff Milton Edgar Hansen that this dismissal counts as a “**STRIKE**” pursuant to 28 U.S.C. § 1915.<sup>13</sup> The Clerk will therefore provide a copy of this Order to the District Clerk for the Eastern District of Texas, Tyler Division, Attention: Three Strikes Manager, 211 West Ferguson, Tyler, Texas 75702. *Should Hansen accumulate three strikes, he may be denied in forma pauperis status, and required to pay the full filing fee, when filing additional civil actions or appeals, unless he demonstrates that he is in imminent danger of serious physical injury.*<sup>14</sup>

**SO ORDERED.**

**SIGNED** this 12<sup>th</sup> day of January 2010.

  
KATHLEEN CARDONE  
UNITED STATES DISTRICT JUDGE

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<sup>13</sup> See 28 U.S.C. § 1915(g) (West 2009) (“In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.”)

<sup>14</sup> See *id.*